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No. 91-1537

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

RICARDO GARZA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge properly rejected a challenge to the verdict, where that challenge rested on post-verdict affidavits of three of the jurors.

2. Whether rebuttal evidence was admissible even though it also was pertinent to a count that had been dismissed for insufficient evidence at the close of the defense case.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-30a, is reported at 942 F.2d 903. The opinion of the district court, Pet. App. 31a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1991. A petition for rehearing was denied on November 25, 1991. The petition for a writ of certiorari was filed on March 19, 1992, and therefore is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, all three petitioners were convicted of participating in and conspiring to participate in the affairs of a drug enterprise through a pattern of racketeering activity (Counts 2 and 3), and conspiring to possess marijuana with the intent to distribute it (Count 4), in violation of 18 U.S.C. 1962(c) and (d), and 21 U.S.C. 846. Petitioner Ricardo Garza was also convicted of engaging in a continuing criminal enterprise (CCE) (Count 1), possession of marijuana with the intent to distribute it (Counts 6, 8-15), use of the telephone to facilitate drug trafficking activity (Counts 21 and 40), money laundering (Counts 42-44 and 47-48), and aviation smuggling (Count 46), in violation of 21 U.S.C. 848, 841(a)(1), and 843(b), 18 U.S.C. 1956, and 19 U.S.C. 1590. Petitioner Juanita Garza was also convicted of money laundering (Counts 42-44). And petitioner Ismael Sosa was also convicted of possession of marijuana with intent to distribute it (Counts 19 and 20) and use of the telephone to facilitate drug trafficking (Count 22).

Ricardo Garza was sentenced to imprisonment for life and fined $1,000,000 on Count 1. A concurrent $1,000,000 fine was assessed on Count 8. In addition, he was sentenced to concurrent terms of 20 years' imprisonment on Counts 2 and 3, 15 years' imprisonment on Counts 6 and 46, 10 years' imprisonment on Counts 8-15, 42-44, and 47-48, and 4 years' imprisonment on Count 40. Count 4 was dismissed in light of petitioner's CCE conviction. Petitioner Juanita Garza was sentenced to concurrent 10-year terms of imprisonment on each of the four counts on which she was convicted. Petitioner Sosa was sentenced to

concurrent 20-year terms of imprisonment on Counts 2, 3, 4, 19, and 20, and a 4-year concurrent term of imprisonment on Count 22.

1. In the mid-1980's, petitioner Ricardo Garza was one of the principals in a huge marijuana distribution network that ranged from Mexico to various American cities, including New York, Chicago, St. Louis, and Kansas City. In March 1985, Garza leased an airport in Hargill, Texas. Thereafter, he hired several pilots to fly planeloads of marijuana from Mexico, first to the Hargill airport and then from the airport to a ranch near the border. Other persons transported the marijuana from the ranch to northern cities. In the course of their travels, the drivers would stop at houses in Houston that the enterprise owned or rented. At those houses, the marijuana was removed from the trucks, weighed, rewrapped, and reloaded into the vehicles for transport to their ultimate destinations. Petitioner Ismael Sosa was one of Garza's truck drivers and played a supervisory role in the smuggling enterprise. Petitioner Juanita Garza, Ricardo Garza's wife, performed a variety of tasks in aid of the enterprise's affairs. In particular, she handled large amounts of cash for the enterprise on several occasions. Pet. App. 5a-8a; Gov't C.A. Br. 4-28, 33-34.

2. After a lengthy trial, the jury returned its verdict on July 28, 1989. The court polled the jury four times, once for each defendant. Each juror stated that he or she was in accord with the verdict. Pet. App. 15a, 31a-32a.

Three days later, juror Thelma Reid telephoned the trial judge's chambers and complained of certain incidents that allegedly had occurred during jury deliberations. With a court reporter present, the judge contacted Reid, who said that she had not agreed to

return a guilty verdict on several of the counts and that two other jurors, Gloria Reyes and Emma Aguilar, would soon contact the judge. Reid recounted some of the discussion that had occurred in the jury room, including her request to send notes to the judge regarding the counts in dispute. Reid stated that another juror had convinced her not to send the notes. Reid asserted that she hesitated during the polling, but announced that she agreed with the unanimous verdict because she became aware that other jurors who had dissented had changed their minds. She claimed that in open court she announced in favor of the verdict because she was afraid of what might have happened if she had dissented at that point. Pet. App. 15a; Gov't C.A. Br. 43-46.

The judge then telephoned juror Gloria Reyes. Reyes complained that the verdict announced in open court was not what she had desired. After speaking with Reyes, the judge spoke with the government and defense attorneys about his conversations with Reid and Reyes. Thereafter, defense lawyers furnished the judge with affidavits from jurors Reid, Reyes, and Emma Aguilar. Each of the affidavits alleged in essence that the verdict was the result of manipulation by the jury foreperson, Inocencia Gomez. The affidavits were incorporated in a motion for a new trial, filed in August 1989. Pet. App. 15a-22a; Gov't C.A. Br. 46-49.

The judge then interviewed jury foreperson Inocencia Gomez, who contradicted the claims of the three affiants. Gomez said that the jurors had used a written ballot for each count and each defendant; that she did not sign a verdict form until the jurors had voted unanimously; and that each defendant had been

given separate consideration. Gomez also described the voting procedure that she had used: the count under consideration was read, and each juror submitted a written ballot. Gomez recalled that she announced the votes after the ballots had been counted and that eventually the voting was unanimous except on one count. According to Gomez, after a recess, the dissenting juror stated that she would change her vote, making the voting on that count unanimous as well. Ballots were distributed and returned, and the unanimous decision was read aloud. Gov't C.A. Br. 49-50.

Later, the judge interviewed juror Reyes in person. While maintaining that the verdicts were not unanimous, Reyes' account of the deliberations was not entirely consistent with the allegations in her affidavit. Reyes said that she had prepared the affidavit but that a defense lawyer had "polished" it. Gov't C.A. Br. 50-51.

Finally, the judge selected another juror, Lita Ortiz, at random and telephoned her. Juror Ortiz agreed with Gomez that votes had been taken as to each defendant and each count; that the ballots were written; that the foreperson then announced the results of the balloting; and that the results of the voting were reflected by the published verdict. Pet. App. 23a; Gov't C.A. Br. 52.

3. On September 27, 1989, the district court issued an order denying the motion for a new trial Pet. App. 31a-42a. The court held that the verdict could not be impeached by the jurors' statements and affidavits, because the jurors' allegations fell squarely within the terms of Fed. R. Evid. 606(b), which prohibits jurors from impeaching their verdict by testifying or

submitting an affidavit about "any matter or statement occurring during the course of the jury's deliberations." Pet. App. 35a-38a; Gov't C.A. Br. 52-53.[1]

4. The court of appeals affirmed. Pet. App. 1a-30a. It agreed that the affiants were endeavoring for the most part to reveal matters that were precluded from consideration by Rule 606(b) and that no exception to the Rule was applicable in the circumstances of this case. Pet. App. 15a-25a.

ARGUMENT

1. Petitioners challenge the court of appeals' reliance on Fed. R. Evid. 606(b) to bar consideration of the affiants' claims that they did not agree on the verdict that was announced in open court. Petitioners claim that Rule 606(b) ought not to apply to situations where jurors approach the trial judge on their own to report that no verdict was reached. Pet. 8-12. Petitioners also maintain that the district court's refusal to consider the jurors' affidavits violated their constitutional right to a unanimous verdict, Pet. 14, and that the court of appeals' approval of the district court's action conflicts with the decisions of other courts. Pet. 15-16. None of those contentions is meritorious.

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[1] While declining to consider the "vast majority" of the allegations in the affidavits because they fell within the prohibitions of Rule 606(b), Pet. App. 35a, the court did address the few complaints advanced by the affiants regarding the introduction of extraneous information by some of the jurors. Accepting the truth of the claims that the isolated comments were made, the court determined that they were not prejudicial and thus did not warrant relief from the verdict. Gov't C.A. Br. 53-54, 61-63. Petitioners do not challenge that determination.

Petitioners essentially ignore the fact that the jury published a unanimous verdict and that the polling provided confirmation that the verdict announced was correct as to each defendant on each count. *United States* v. *Shepherd*, 576 F.2d 719, 724-725 (7th Cir.), cert. denied, 439 U.S. 852 (1978); Fed. R. Crim. P. 31(a) and (d). Petitioner's argument is simply an effort to impeach a verdict through post-verdict submissions of jurors alleging that they really did not intend to find the defendants guilty on some or all counts and explaining away their published pronouncements of guilt as the product of a subjective fear of condemnation from their peers. Rule 606(b), which restates the common law prohibition against impeachment of a verdict by a juror,[2] controls the disposition of that contention. *Tanner* v. *United States*, 483 U.S. 107, 121-127 (1987). See also, *e.g.*, *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915).

Petitioners' claim of a conflict among the circuits is unimpressive. Most of the cases they cite involve situations in which the jury reached one verdict but then announced a different one in court. In those circumstances, juror affidavits have been deemed to be adequate support for the judge to amend the verdict to reflect the one that the jury actually reached. See *McCullough* v. *Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991); *United States* v. *Stauffer*, 922 F.2d 508 (9th Cir. 1990); *Attridge* v. *Cencorp Division of Dover Technologies Int'l*, 836 F.2d 113 (2d Cir. 1987); *Freid* v. *McGrath*, 135 F.2d 833 (D.C. Cir. 1943).

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[2] The proposition that a jury cannot impeach its verdict traces its lineage to 1795, when Lord Mansfield refused to consider an affidavit from jurors admitting that they had reached their verdict by drawing lots. *Vaise* v. *Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1795).

Illustrative of this exception to Rule 606(b) is *United States* v. *Dotson*, 817 F.2d 1127, modified in part on other grounds, 821 F.2d 1034 (5th Cir. 1987). In *Dotson*, the jury voted to acquit on a particular count, but the verdict on that count was announced as a conviction. The judge corrected the verdict after conversations with the jurors confirmed that the announced verdict was wrong. The Fifth Circuit later explained *Dotson* as involving a narrow "clerical error" exception to Rule 606(b). *Robles* v. *Exxon Corp.*, 862 F.2d 1201, 1207-1208 & n.9 (5th Cir.), cert. denied, 490 U.S. 1051 (1989). In *United States* v. *Stauffer*, 922 F.2d 508, 513 (1990), the Ninth Circuit followed *Dotson* when it approved a district court's action in correcting a clerical error by changing the verdict on one count from guilty to not guilty and changing the verdict one another count from not guilty to guilty.

Of the federal cases cited by petitioners, only *United States* v. *Smith*, 562 F.2d 619 (10th Cir. 1977), and *Young* v. *United States*, 163 F.2d 187 (10th Cir.), cert. denied, 332 U.S. 770 (1947), deal with issues other than the use of jury affidavits or testimony to correct a mistaken transmission of the verdict from the jury. Pet. 15-16. *Young* involved an attempt to impeach the verdict through affidavits by jurors, which the court of appeals disallowed. And *Smith* involved a dispute over the response given by a juror during the polling; the court resolved that dispute by relying upon the stenographic record and refusing to allow testimony to rebut it. There is, therefore, no conflict among the circuits with respect to the application of Rule 606(b) to a verdict challenge such as the one in this case.

2. Count 5 charged petitioner Ricardo Garza with possessing marijuana on January 11, 1986, at the

apartment of Hector Palacios. At the close of the government's case-in-chief, the district court dismissed that count on the ground that no evidence had been adduced to support it. In his defense, Ricardo Garza established that government agents had not found his fingerprints on certain items seized at the Hargill airport. From that, Garza laid the basis for an argument that he had nothing to do with the evidence found at the airport. In its rebuttal case, the government introduced evidence of the discovery of a cellular telephone, scales, and plastic wrap, which had been found on January 11, 1986, during a search of Palacios's apartment, where Garza had been found sleeping. That evidence would have been admissible in the government's case-in-chief to help prove Count 5, but the jury never deliberated on that count, and the court instructed the jury that it could consider the Palacios apartment evidence only for rebuttal purposes. Pet. App. 29a-30a; Gov't C.A. Br. 69-70.

In the court of appeals, Garza claimed that the district court erred in admitting the rebuttal evidence because it tended to prove Count 5, on which he had already been acquitted. Garza also alleged that the court's instructions to the jury limiting its consideration of the rebuttal evidence were confusing. The court of appeals rejected Garza's claims, finding that the evidence was not barred by double jeopardy principles, that the court's instructions were not confusing, and that the introduction of the evidence, even if erroneous, was harmless. Pet. App. 29a-30a.

Contrary to petitioners' contention, Pet. 16-19, principles of double jeopardy and collateral estoppel do not bar the introduction of evidence that is relevant for some legitimate purpose simply because it might also tend to prove a count that has previously been dismissed. Neither double jeopardy nor collateral

estoppel bars the government from introducing any "relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which [the defendant] has been acquitted." *Dowling* v. *United States*, 493 U.S. 342, 348 (1990).

Petitioner erroneously alleges that the rebuttal evidence allowed the government either to reprosecute him on Count 5 of the indictment or to serve as a predicate offense for the RICO conspiracy count. The jury, however, was never required to deliberate on Count 5. The RICO conspiracy count made no mention of Hector Palacios or any of the evidence seized at his apartment in connection with any predicate offense. In any event, the court instructed the jury that the evidence offered by the government of the "incident that happened in 1986" was not to be considered "for any of the so-called predicate offenses" involved in the continuing criminal enterprise or RICO counts. Tr. 2778.

Petitioner Garza also disputes the trial court's determination that the evidence in question was admissible as proper rebuttal. His argument is limited to a conclusory statement that the evidence supported, rather than rebutted, his defense theory. Pet. 17 n.16. The decision to admit the rebuttal evidence was a matter within the court's broad discretion. *United States* v. *Laboy*, 909 F.2d 581, 588 (1st Cir. 1990); *United States* v. *Levy*, 904 F.2d 1026, 1031 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991). Nothing in the record demonstrates that the court's ruling constituted an abuse of that discretion.

Finally, petitioner Garza assails the sufficiency of the instructions directing the jury to consider the evidence only for rebuttal purposes. Pet. 17 n.16; Gov't C.A. Br. 70. Petitioner does not indicate that he

sought a more elaborate instruction in a timely fashion. Moreover, the jury, which was not reluctant to communicate with the court during its deliberations, did not indicate any confusion regarding the manner in which it was to treat the rebuttal evidence.

In any event, the evidence complained of was only a small part of the government's case against Ricardo Garza. The proof of his association with and leadership of a vast marijuana trafficking enterprise was abundant. The proof included testimony from members of the enterprise and numerous items of corroboration. The government proved numerous predicates for the RICO violation. That being so, the court of appeals correctly concluded, Pet. App. 30a, that any error in the admission of the rebuttal evidence was harmless. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992